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## BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

DOCKETED

APR 19 2002

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AZ CORP COMMISSION  
DOCUMENT CONTROL

WILLIAM A. MUNDELL  
Chairman  
JIM IRVIN  
Commissioner  
MARC SPITZER  
Commissioner

In the matter of:

TOWER EQUITIES, INC.  
8141 N. Main Street  
Dayton, Ohio 45415-1747  
CRD #16195

PHILIP A. LEHMAN  
Tower Equities, Inc.  
8141 N. Main Street  
Dayton, Ohio 45415-1747  
CRD #1345038,

Respondents.

DOCKET NO. S-03439A-00-0000

**DIVISION'S OPPOSITION  
TO RESPONDENTS'  
APPLICATION FOR REHEARING**

Arizona Corporation Commission

DOCKETED

APR 19 2002

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The Securities Division (the "Division") of the Arizona Corporation Commission (the "Commission") hereby opposes respondents' application for rehearing, docketed April 11, 2002 (the "Application"). The Division does not object to treating the Application as if it were timely filed.<sup>1</sup> The Division opposes the Application on the grounds that (1) Philip A. Lehman ("Lehman") abandoned his request for hearing, (2) neither Lehman nor Tower Equities, Inc. ("Tower") filed any exceptions to the proposed order or appeared at the open meeting to request modifications to the proposed order, and (3) the present Application seeks to change the order of revocation based solely upon arguments that were already raised by Tower during the hearing, and

<sup>1</sup> The Division served the respondents with a copy of the Commission's Decision No. 64559 in this matter, by hand delivering it to an employee of respondents' counsel, pursuant to A.A.C. R14-3-101, R14-4-301, and R14-4-304(C) and (D), on April 17, 2002. Such service was effected on April 17 without conceding that no earlier service had been accomplished. In particular, the affidavits attached to the Application show that respondents received a copy of the decision not later than April 9, 2002, and Docket Control may have effected service of the decision upon respondents on or about February 26, 2002. Nonetheless, pursuant to A.R.S. § 12-901(2), the question of the exact date of service will become moot if the Commission treats the Application as timely filed. In that event, respondents' time within which to appeal would begin to run when they have been served with a copy of the Commission's order either denying rehearing, or deciding the issues raised after rehearing. The Division respectfully submits that this would be the most efficient and just manner of proceeding in this case.

1 considered and decided against Tower, by the Hearings Division and the Commission. The  
2 Division respectfully requests that the Commission deny a rehearing.

3 I.

4 **RESPONDENT LEHMAN ABANDONED HIS REQUEST FOR HEARING**

5 Respondents' Application is based solely upon their contention that the Commission  
6 imposed "excessive penalties" upon them, and they ask for rehearing pursuant to A.A.C. R14-3-  
7 112(5). Lehman's request for this relief should be denied, because, among other reasons, he never  
8 raised any objection to revocation of his Arizona securities salesman's registration at any point in  
9 the proceedings, apart from having filed a request for hearing on January 18, 2001. He has not  
10 preserved this issue for further review, either by rehearing or by appeal.

12 The Division and respondents in this proceeding filed a Joint Pre-Hearing Statement on  
13 May 30, 2001. That document included 38 stipulations of substantive facts (Joint Statement, pp.  
14 2-7). It identified a single factual issue for determination by the Hearing Officer, which pertained  
15 solely to the issue of whether Tower's dealer registration should be revoked (Joint Statement at 8).

16 The Joint Statement then listed the three "Questions of Law and Policy" which the parties  
17 agreed were the questions to be decided at the hearing -- all of which pertained solely to the issue  
18 of whether Tower's dealer registration should be revoked (Joint Statement, pp. 8-9). The first two  
19 questions were disputes concerning the interpretation of A.R.S. § 44-1961 (which relates to the  
20 Commission's power to deny, revoke or suspend the registrations of *dealers*), and the third  
21 question was whether revocation of Tower's dealer registration would be an excessive sanction.  
22 Finally, on pages 15-18 of the Joint Statement is a section captioned "Respondents' Proposed  
23 Conclusions of Law and Summary of Position," in which respondents argued that Tower's dealer  
24 registration should not be revoked. The revocation of Lehman's salesman registration under  
25 A.R.S. § 44-1962 was not opposed by the respondents in the Joint Statement.  
26

1 The hearing on June 13, 2001, consisted of the admission into evidence of the stipulations  
2 of fact and the parties' exhibits, and closing arguments. Respondents did not oppose the  
3 revocation of Lehman's salesman registration during the hearing. See Decision No. 64559,  
4 Finding of Fact No. 41 ("Respondent Lehman did not argue against the imposition of a sanction of  
5 revocation as a consequence of the SEC C&D Order").

6 At the close of the hearing, respondents asked for and were granted the opportunity to  
7 submit a post-hearing memorandum. They filed their memorandum on July 2, 2001. Respondents  
8 titled their memorandum "Brief in Support of Respondent Tower Equities, Inc.'s Request Not to  
9 Have Its Arizona License Revoked." The document states that it was submitted on behalf of  
10 Tower, only. The only subject discussed in the document is Tower's request that its dealer  
11 registration not be revoked.  
12

13 In sum, there is nothing to "rehear" with regard to revocation of Lehman's registration,  
14 because Lehman abandoned his request for hearing on that issue.

## 15 II.

### 16 **RESPONDENTS FAILED TO PARTICIPATE IN THE OPEN MEETING**

17 In the affidavits attached to their Application, respondents admit that they received a copy  
18 of the Hearing Officer's proposed order, on February 1, 2002 (Mallon Affidavit), and a second  
19 copy on February 11, 2002 (Zavala Affidavit). They further admit that they knew that the  
20 Commission would consider whether to adopt the Hearing Officer's recommendation at a  
21 subsequent "hearing" (the open meeting on February 21, 2002). On the morning of the open  
22 meeting, Division personnel called respondents' counsel. Respondents assured the Division that  
23 respondents knew that the open meeting was scheduled to take place later that morning. Further,  
24 respondents said that they had received a copy of the proposed order that was to be considered by  
25 the Commissioners during the open meeting.  
26

1 Respondents never filed any exceptions to the proposed order, nor did they appear at the  
2 open meeting. In these circumstances, the Commission should not grant a rehearing. Respondents  
3 had their chance to argue their case to the Commissioners on February 21, 2002, and they declined  
4 to participate. A rehearing in this case would reward and encourage needless delay and waste of  
5 the Commissioners' time.

6 **III.**

7 **RESPONDENTS' APPLICATION SAYS NOTHING NEW**

8 On page 2 of their Application, respondents list the four reasons why they claim the  
9 revocations were "excessive penalties" in this case. These are the identical arguments that  
10 respondent Tower already raised, in the Joint Statement, at the hearing, and in its post-hearing  
11 memorandum. (Lehman, as discussed above, never raised any arguments against revocation of his  
12 registration at all.) These four arguments were considered and decided against respondent Tower  
13 by the Hearings Division in its recommended opinion and order, which the Commission adopted  
14 as its Decision No. 64559. Rehearing would be pointless.

15  
16 Dated this 19th day of April, 2002

17  
18 **Janet Napolitano**  
19 Attorney General  
20 Consumer Protection & Advocacy Section

21 

22 **Amy J. Leeson**  
23 Special Assistant Attorney General  
24 **Moirra McCarthy**  
25 Assistant Attorney General  
26 Attorneys for the Securities Division of the  
Arizona Corporation Commission

1 ORIGINAL AND TEN COPIES  
2 filed with Docket Control  
3 on April 19, 2002

4 COPY delivered by hand to office of  
5 Hearing Officer Marc Stern  
6 on April 19, 2002

7 COPY served upon Respondents by  
8 1<sup>st</sup> class mail on April 19, 2002, at  
9 the address of their attorneys:

10 Don Zavala, Esq.  
11 Snell & Wilmer  
12 One Arizona Center  
13 Phoenix, Arizona 85004-0001

14 Attorneys for both Respondents

15 BY: 

16 N:/Enforce/IIO/AJL-Lehman&Tower/REHEARING opposition 4-19-02  
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